Supreme Court, U.S.
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No. 97-699

In the Supreme Court of the United States

OCTOBER TERM, 1997

LARRY COOPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's claims, brought under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, that certain actions by his supervisors constituted discrimination and intentional and negligent infliction of emotional distress are preempted by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unpublished, but the decision is noted at 112 F.3d 515 (Table). The opinions and orders of the district court (Pet. App. 4a-11a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1997. A petition for rehearing was denied on July 21, 1997. Pet. App. 12a. The petition for a writ of certiorari was filed on October 20, 1997 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 22, 1994, petitioner, a former civilian employee of the United States Navy who is currently on disability retirement, initiated this lawsuit in the United States District Court for the Southern District of California against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, alleging intentional and negligent infliction of emotional distress. Pet. App. 6a. The complaint included allegations that petitioner's supervisors had wrongfully (1) terminated his employment, (2) moved the Merit Systems Protection Board to dismiss his appeal, (3) failed to give him adequate assistance in seeking to vindicate his rights to disability benefits, sick leave, and annual leave, (4) attributed unpaid debts to him in his personnel record, (5) made disparaging statements regarding his job performance, job attendance, and workplace conduct, (6) released information concerning his job performance and employment complaints to a congressional representative, and (7) failed to solicit his comments on a reassignment form. Order Granting Def.'s Mot. to Dismiss 2-3. On April 11, 1995, the district court dismissed petitioner's complaint without prejudice, on the ground that petitioner's allegations all dealt with employment-related actions and were thus preempted by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and by the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (codified in scattered sections of Title 5 of the United States Code). Order Granting Def.'s Mot. to Dismiss 3-7.

2. On June 23, 1995, petitioner filed an amended complaint, repeating most of the allegations from the

first complaint and adding several more. In his amended complaint, petitioner claimed that security officers of his employer had broken into his locker and automobile, and that his supervisors had wrongfully denied him access to a telephone in his workplace, required him to work in isolation, transferred him to a new workplace in retaliation for his union involvement and because of his racial and ethnic origin, monitored his work habits unnecessarily closely, stared at him in an intimidating fashion, and engaged in other activities amounting to a pattern of intentional acts of racial discrimination, harassment, reprisal and retaliation for his involvement in the union. See First Amended Complaint 8-10. On January 8, 1996, the district court dismissed petitioner's amended complaint, this time without leave to amend. Pet. App. 5a-11a. The court found that many of petitioner's new claims were time-barred[1] and that the new claims that were not time-barred dealt solely with employment-related conduct and were thus preempted by Title VII and by the CSRA. *Id.* at 7a-11a.

3. The court of appeals affirmed the district court's dismissal of petitioner's complaint, holding that all of petitioner's claims dealt either with racial discrimination in employment or with prohibited personnel practices and were thus preempted by Title

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[1] Petitioner had submitted his administrative claim under the FTCA on October 30, 1992, but the bulk of the conduct underlying his amended complaint occurred more than two years before that date. See Pet. App. 8a; 28 U.S.C. 2401(b) ("A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues.").

VII and the CSRA. Pet. App. 1a-3a.[2] The court observed that, under this Court's decision in *Brown* v. *General Services Administration*, 425 U.S. 820 (1976), Title VII provides the exclusive judicial remedy for claims of discrimination in federal employment. Pet. App. 2a. Accordingly, petitioner's claims that his employer had subjected him to a "pattern of intentional acts of racial discrimination" at his workplace were preempted by Title VII. The court acknowledged (*ibid.*) that, under its own precedent, an exception to Title VII preemption is available for allegations of "highly personal violations"—an exception that has so far been found applicable to allegations of physical sexual abuse, see, *e.g.*, *Arnold* v. *United States*, 816 F.2d 1306 (9th Cir. 1987); *Kent* v. *Howard*, 801 F. Supp. 329 (S.D. Cal. 1992), and to allegations of persistent sexual harassment, see, *e.g.*, *Otto* v. *Heckler*, 781 F.2d 754, amended on other grounds, 802 F.2d 337 (9th Cir. 1986). The court, however, upheld the district court's rejection of petitioner's attempt to fit his claims within that exception. Pet. App. 2a-3a.

The court of appeals also held that those claims that were not preempted by Title VII dealt with "prohibited personnel practices" and were thus preempted by the CSRA. Pet. App. 3a (quoting 5 U.S.C. 2302(a)(1)). Because petitioner's remaining allegations, which dealt with matters such as how petitioner's supervisors monitored his work habits and statements his supervisors allegedly made to a congressional representative regarding petitioner's

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[2] The court of appeals did not reach the question whether any of petitioner's claims were time-barred, because it held that all the claims were preempted. Pet. App. 3a n.1.

employment, "relate[d] to or ar[o]se out of personnel actions that violate[d] the CSRA's merit system principles," the court upheld the district court's dismissal of the claims that were not preempted by Title VII. See *ibid.*

ARGUMENT

The decision of the court of appeals that petitioner's claims are preempted either by Title VII or by the CSRA is correct. That decision is consistent with this Court's precedent and does not conflict with the decision of any other court of appeals. The straightforward application by the court of appeals of this Court's decision in *Brown* v. *General Services Administration*, 425 U.S. 820 (1976), as well as of its own precedent, to the specific allegations in petitioner's amended complaint presents no legal issue warranting review by this Court.

1. The court of appeals correctly concluded that many of petitioner's claims under the FTCA are preempted by Title VII. In *Brown*, this Court observed that Title VII, "with its rigorous administrative exhaustion requirements and time limitations, would be driven out of currency were immediate access to the courts under other, less demanding statutes permissible." 425 U.S. at 833. Congress intended Title VII to provide the "exclusive, preemptive administrative and judicial scheme for the redress of federal employment discrimination." *Id.* at 829. Title VII must therefore be treated as "the exclusive judicial remedy for claims of discrimination in federal employment." *Id.* at 835. The court of appeals properly applied *Brown* in dismissing petitioner's claims based on allegations that his supervisors had monitored his work habits too intrusively,

wrongfully transferred him to undesirable positions, and taken other adverse employment actions against him because of his race.

Petitioner argues (Pet. 7) that the court of appeals misapplied *Brown* because the claims that the court found preempted by Title VII arose from conduct motivated not only by discriminatory animus but also by the desire to retaliate against petitioner for his union involvement. Petitioner misreads the opinion of the court of appeals, which held only that petitioner's claims are preempted by Title VII "*to the extent* that they [a]re premised on racial discrimination." Pet. App. 2a (emphasis added). To the extent the claims are based on conduct in retaliation for petitioner's union involvement, the claims are preempted because Congress has provided for exclusive review of those claims under the CSRA. See 5 U.S.C. 7102, 7116(a)(2), 7118(a)(7), 7123(a).[3] Thus, even if petitioner alleged two improper motives for the same actions, and even if one of those alleged motives did not involve racial animus, the court of appeals was nonetheless

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[3] Section 7102 provides that each employee of a covered federal agency "shall have the right to form, join, or assist any labor organization." Section 7116(a)(2) provides that it shall be an "unfair labor practice" for a covered federal agency to "encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment." Section 7118 sets out the procedure for filing a complaint of an unfair labor practice. A complainant may receive a hearing before the Federal Labor Relations Authority (FLRA), which may issue an order requiring the employer to cease and desist from the unfair labor practice and to take "such other actions as will carry out the purpose" of the CSRA. 5 U.S.C. 7118(a)(7). Judicial review of the FLRA's final order may be obtained pursuant to Section 7123(a).

correct in holding that petitioner's claims may not be brought under the FTCA.[4]

2. a. The court of appeals was also correct in holding that petitioner's other claims are preempted by the CSRA. Petitioner's remaining claims dealt with employment-related actions taken by his supervisors, including decisions regarding transfers, outstanding service awards, workplace security, reclassifications, evaluations, promotions, sick leave, and termination. Those claims all fall within the CSRA's comprehensive scheme for redressing prohibited personnel practices in federal employment. See *United States* v. *Fausto*, 484 U.S. 439, 445 (1988) (CSRA introduced "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration"); see also 5 U.S.C. 2302(a)(2)(A) (describing personnel actions). In *Fausto*, this Court held that the CSRA preempted a

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[4] Petitioner also argues (Pet. 6) that the court of appeals misapplied its own precedent by discussing the decisions in *Otto* v. *Heckler*, 781 F.2d 754, amended, 802 F.2d 337 (9th Cir. 1986), and *Kent* v. *Howard*, 801 F. Supp. 329 (S.D. Cal. 1992), even though they were "not relevant." That argument is unavailing because the court of appeals concluded that those decisions did not apply to petitioner's case. See Pet. App. 2a-3a. Ironically, petitioner himself had urged the court of appeals to apply those cases and to find that he had alleged "highly personal violations" that should not be preempted by Title VII. Pet. C.A. Reply Br. 4-5 ("[I]n this case many of the allegations are outrageous and highly personal.") (citing *Otto* and *Kent*); Pet. for Reh'g 1 ("The Court of Appeals overlooked the fact that [petitioner's] First Amended Complaint alleged a tortious pattern of conduct which included 'highly personal violations.'").

federal employee's suit under the Back Pay Act, 5 U.S.C. 5596, and the Tucker Act, 28 U.S.C. 1491, based on the allegation that he had been wrongfully suspended. The Court carefully examined the language and structure of the CSRA and concluded that Fausto was not included in the class of employees to whom the CSRA afforded administrative and judicial review of adverse personnel actions. 484 U.S. at 443-455. Explaining that "the CSRA established a comprehensive system for reviewing performance action taken against federal employees," this Court nonetheless held that his suit under the Back Pay Act and the Tucker Act was preempted. *Id.* at 455.

Since *Fausto*, the courts of appeals have agreed that the CSRA precludes damage claims based on adverse personnel actions by federal employers if those claims are brought under federal laws other than the CSRA. See, *e.g.*, *Rollins* v. *Marsh*, 937 F.2d 134, 137-139 (5th Cir. 1991) (CSRA precludes constitutional tort claim); *Saul* v. *United States*, 928 F.2d 829, 835-840 (9th Cir. 1991) (same); *Lombardi* v. *Small Business Admin.*, 889 F.2d 959, 960-961 (10th Cir. 1989) (same); *Stephens* v. *HHS*, 901 F.2d 1571, 1575-1577 (11th Cir.) (CSRA preempts constitutional claims and claim brought under Administrative Procedure Act (APA)), cert. denied, 498 U.S. 998 (1990); *Ryon* v. *O'Neill*, 894 F.2d 199, 201-205 (6th Cir. 1990) (CSRA preempts claims brought under APA and Mandamus Act); *Berrios* v. *Department of the Army*, 884 F.2d 28, 30-31 (1st Cir. 1989) (CSRA preempts constitutional tort claim); *Volk* v. *Hobson*, 866 F.2d 1398, 1403-1404 (Fed. Cir.) (same), cert. denied, 490 U.S. 1092 (1989). See also *Carducci* v. *Regan*, 714 F.2d 171, 173-175 (D.C. Cir. 1983) (CSRA preempts

claim brought under APA); *Towers* v. *Horner*, 791 F.2d 1244, 1246 (5th Cir. 1986) (same); *Pinar* v. *Dole*, 747 F.2d 899, 909-913 (4th Cir. 1984) (CSRA preempts claims brought under Constitution and APA), cert. denied, 471 U.S. 1016 (1985). Not surprisingly, the courts of appeals have also found that the CSRA preempts state-law tort claims such as those petitioner brought here. See, *e.g.*, *Steele* v. *United States*, 19 F.3d 531, 532-533 (10th Cir. 1994); *Rollins*, 937 F.2d at 139-140; *Saul*, 928 F.2d at 840-843; *Rivera* v. *United States*, 924 F.2d 948, 952 (9th Cir. 1991); *Berrios*, 884 F.2d at 30-33; *Broughton* v. *Courtney*, 861 F.2d 639, 641-644 (11th Cir. 1988). See also *American Postal Workers Union* v. *United States Postal Serv.*, 940 F.2d 704, 708-709 (D.C. Cir. 1991); *Premachandra* v. *United States*, 739 F.2d 392, 393-394 (8th Cir. 1984).

b. In regard to his tort claims, petitioner seeks (Pet. 9) to involve this Court in reviewing the finer points of the Ninth Circuit's application of its own precedent. Petitioner suggests that the court of appeals' decision in this case conflicts with its earlier decisions permitting federal employees to bring claims under the FTCA alleging sexual harassment and rape by supervisors. See Pet. 9 (citing *Sheehan* v. *United States*, 896 F.2d 1168, amended, 917 F.2d 424 (9th Cir. 1990), and *Brock* v. *United States*, 64 F.3d 1421 (9th Cir. 1995)). This Court does not ordinarily grant certiorari to resolve conflicts between decisions of the same court of appeals. See *Davis* v. *United States*, 417 U.S. 333, 340 (1974). In any event, there is no conflict between the court of appeals' decision in petitioner's case and its decisions in *Sheehan* and *Brock*: Unwanted sexual advances and rape are not personnel actions, unlike decisions regarding job transfers and reclassifications, out-

standing service awards, evaluations, promotions, sick leave, and the like. See *Brock*, 64 F.3d at 1425; 5 U.S.C. 2302(a)(2)(A).

In fact, the court of appeals in *Sheehan* did not even pass on the question whether the CSRA preempts tort claims for infliction of emotional distress. The court ruled instead that the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.*, does not preempt those claims because that Act covers only physical injury. See 896 F.2d at 1173-1174. Similarly, the district court decisions relied on by petitioner (Pet. 9), *Gergick* v. *Austin*, 764 F. Supp. 580 (W.D. Mo. 1991), and *Underwood* v. *United States Postal Service*, 742 F. Supp. 968 (M.D. Tenn. 1990), addressed the question of FECA preemption rather than CSRA preemption. Nor did the First Circuit, in *Santiago-Ramirez* v. *Secretary of Department of Defense*, 984 F.2d 16 (1993), decide whether the CSRA preempted the claim for intentional infliction of emotional distress alleged in that case. Rather, the court of appeals held that a claim for intentional infliction of emotional distress does not fall within the exceptions to liability set out in the FTCA, 28 U.S.C. 2680. See 984 F.2d at 20-21.

c. Petitioner also argues (Pet. 10) that this Court should review the dismissal of his complaint because, "in the situation here involved," petitioner could not have obtained sufficient redress for his personnel grievances under the CSRA. Petitioner does not attempt, however, to show that "the situation here involved" concerns a legal issue of any importance to anyone apart from himself. Review by this Court is thus unwarranted regardless of the merits of petitioner's argument. See, *e.g.*, *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)

(noting that "it is very important that [the Court] be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties").

In any case, petitioner's argument lacks merit. Petitioner complains that he would have had to file many CSRA complaints to address all of the wrongs that he believes were done him by his employer, but he does not suggest that the remedies available to him under the CSRA would be inadequate to redress those alleged wrongs. Moreover, even if petitioner could make a showing that the relief available to him under the CSRA is inadequate by some measure, that fact would not alter the preemption analysis. As this Court made clear in *Bush* v. *Lucas*, 462 U.S. 367, 388 (1983), the fact that Congress has not provided "complete relief" for all persons under a statutory scheme that provides an exclusive remedy does not give courts the authority to provide other avenues of relief. See also *Schweiker* v. *Chilicky*, 487 U.S. 412, 425 (1988).[5]

3. Finally, petitioner urges (Pet. 11) this Court to grant certiorari to "settle" the question whether a "former federal employee" may seek relief under the

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[5] Petitioner's reliance (Pet. 10) on Congress's failure to amend the FTCA to codify this Court's interpretation of the CSRA in *Bush* and *Fausto* is also unavailing. No principle of law requires Congress to ratify this Court's statutory interpretations for them to retain their force. Congress had no need to amend the FTCA because it had already made clear its intent to preempt all other remedies by the language and structure of the CSRA. Under petitioner's reasoning, Congress would be required to amend every law that it intends to affect by the enactment of another law.

FTCA. The FTCA does not use the term "employee" to describe a person entitled to bring tort claims against the United States. The question relevant to this case is the meaning of the term "employee" under the CSRA, rather than under the FTCA. If petitioner is an "employee" within the meaning of that term in the CSRA in regard to his employer's post-employment actions, then that Act preempts his tort claims based on those actions. On that question, there is no controversy for this Court to "settle," nor is any likely to arise. The CSRA expressly includes in its definition of "employee" any individual whose employment has terminated because of an unfair labor practice, see 5 U.S.C. 7103(a)(2)(B), and incorporates termination into the definition of a "prohibited personnel practice" for which a covered employee may seek redress See *Berrios*, 884 F.2d at 32 (citing 5 U.S.C. 2302(a)(2)(A)(iii), 7512).[6]

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[6] The express inclusion of former employees in the CSRA's definition of employee distinguishes the issue in this case from the issue of the meaning of "employee" in Title VII that this Court decided in *Robinson* v. *Shell Oil Co.*, 117 S. Ct. 843 (1997). Nevertheless, as petitioner acknowledges (Pet. 11), in *Robinson*, this Court held that the term "employee," as used in Title VII, includes former employees.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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